



Administrative Tribunal

Distr.
LIMITED

AT/DEC/681
11 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 681

Case No. 742: MAQARI

Against: The Commissioner-General
of the United Nations
Relief Works Agency
for Palestine Refugees
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry;

Mr. Francis Spain;

Whereas, on 11 July 1993, Ibtisam Musa Maqari, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA), filed an application, containing, inter alia, the following pleas, asking the Tribunal:

"...

b. [To rescind] the decision of the Field Office Director to terminate the Applicant for misconduct. ...

c. [To rescind] the Commissioner General's decision ... rejecting the recommendation of the JAB [Joint Appeals Board] ...

d. [To reinstate] the Applicant to duty, and [to consider] her cessation from work on 7 September 1991 [onwards], as special leave with full pay.

e. [To compensate] the Applicant for the injury, intimidation, humiliation and hardship and obstruction of justice estimated at US\$40 000.

f. [To pay] secretarial and legal counselling fees estimated at US\$3 000."

Whereas the Respondent filed his answer on 12 November 1993;
Whereas the Applicant filed written observations on
10 February 1994;

Whereas the Applicant submitted an additional statement on
6 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 July 1989, as a Staff Nurse at the Muzeireeb Health Point, South Area, on a temporary indefinite appointment, which was confirmed on 28 November 1990. With effect from 7 September 1991, the Applicant was suspended without pay, and on 25 November 1991, her service with UNRWA was terminated for misconduct, pursuant to area staff regulation 9.1.

On 22 August 1991, the Area Officer, South Area, informed the Field Personnel Officer, Syrian Arab Republic (SAR), that two Muzeireeb Health Point staff members, the Applicant and a Cleaner, had been arrested on 21 August 1991 and were charged with "issuing false coupons for distributing rations to pregnant [women] and children and sold them."

On 2 September 1991, the Area Officer, South Area, submitted a written report with statements from the two staff members, the Medical Officer of Muzeireeb Health Point, and a copy of the procès-verbal of the criminal investigation by the Syrian authorities. In her statement, the Applicant reported that she had been questioned by Syrian officials on 21 August 1991, and shown UNRWA ration cards. According to her report, she appeared before the prosecution and judge and was asked whether the handwriting on the cards was hers and whether they had been filled in correctly. She responded that the handwriting was not hers and that the cards were improperly

filled in. She was then dismissed as being innocent. The record indicates that testimony was given by others, including a patient at the clinic and her husband, who confessed that they had sold ration cards and said that the Applicant was involved in an arrangement whereby she provided them with ration cards for sale and shared in the profits.

On 4 September 1991, the Director of UNRWA Affairs, SAR, constituted a Board of Inquiry, composed of the Field Health Officer, SAR, the Area Officer, Damascus Area, and the Deputy Field Supply & Transport Officer, SAR. He informed them that the two staff members had been detained on 21 August, on suspicion of having falsified and sold UNRWA ration coupons, which were tendered to two merchants who had reported the matter to the authorities. He asked the Board of Inquiry "to investigate whether the two staff members ... have committed any acts, which are incompatible with their status as UNRWA staff members."

On 5 September 1991, the Field Personnel Officer, UNRWA - SAR, informed the Applicant that she would be suspended from work without pay pending investigation, with effect from 7 September 1991.

On 2 October 1991, the Field Nursing Officer, SAR, informed the Field Health Officer, SAR, that during a field visit to Muzeireeb Health Point, the Medical Officer in Charge conveyed to her "his anxiety because he was threatened [with] murder by [the Applicant's] relatives if any disciplinary action would be taken against her."

On 24 October 1991, the Applicant wrote to the Director General of UNRWA, that the accusation against her had been made by one of her colleagues, who had herself stolen the ration cards, in collaboration with a medical orderly. She complained that her "dismissal" had been unjust and was "designed to replace me by the cousin of [one of the doctors in the clinic]" who she claimed had been appointed in her place. She asked for a "re-investigation" under his supervision as she was "completely innocent of this accusation".

On 5 November 1991, the Board of Inquiry reported its findings to the Director of UNRWA Affairs, SAR. After reviewing the testimony heard, including that of the Applicant, the Board found as follows:

"The Board of Inquiry observed the following:

1. [The Applicant] did not tell the truth:

a. She denied that she knows the location of [the patient's] house contrary to her written note on [the patient's] Ante Natal card (...) about a Home Visit...

b. She stated that on 30.7.1991 she had injected [the patient with] inferon while there is no injection slip dated on 30.7.1991 except the one the date of which has been changed from 20 to 30.7.91 (...). Comparison of the number of injections and needles in the register and the number and kind of injection slips, at the two dates confirm[s] that the injection was given on 20.7.1991.

c. [Name deleted] stated that he did not ... see [the patient] that day [30.7.1991], contrary to [the Applicant's] statement.

2. A relative of [the Applicant] has paid LS [Syrian pounds] 20,000 to the Criminal Police. This raises a question: If she is innocent, why this pay?

3. [The patient] and her husband have confessed to the Criminal Police that they have sold the falsified Authorization forms. Why should they have accused [the Applicant] of having delivered these forms to them if it was not true?"

On 14 December 1991, the Applicant wrote to the Director of UNRWA Affairs, SAR, stating that one of the patients had been found guilty of stealing ration cards from the clinic. She further stated that the Board of Inquiry had "found nothing against me in this sense, and found me innocent of taking any part in stealing the cards, though they found me responsible for negligence." She asked that her case be reconsidered, as the investigation was "not so fair". She claimed that a doctor in the clinic had appointed his cousin in her place. She also noted that she had not been informed of the final decision and had not been asked to return to work.

In a letter dated 25 November 1991, the Director of UNRWA Affairs, SAR, informed the Applicant as follows:

"... the Board of Inquiry ... to investigate into the incident which took place in Muzeireeb Health Centre has found you guilty of having falsified UNRWA ration coupons and having sold them. By doing so you have proven to be unreliable and you have acted dishonestly in your duty. You have threatened your supervisor.

...

It has, therefore, been decided to terminate your service for misconduct in the interest of the Agency under area staff regulation 9.1."

On 11 January 1992, the Applicant submitted a request for reinstatement, to the Director of UNRWA Affairs, SAR. On 2 February 1992, the Director of UNRWA Affairs, SAR, replied: "I have reviewed your case and regret that nothing in your letter convinces me to reconsider the decision to terminate you, which is hereby confirmed."

On 14 January 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB), requesting, inter alia, a copy of the procès-verbal and the minutes of the report of the Board of Inquiry. On 23 February 1992, the Field Administration Officer, SAR, sent to the Applicant a copy of the report of the Board of Inquiry and a copy of the procès-verbal prepared by the Criminal Security Division of the Syrian Police. He noted that "the identity of certain persons mentioned in these reports is not revealed," explaining that "to do otherwise would put the security of these persons at risk."

On 10 May 1993, the JAB forwarded its report to the Officer-in-Charge, Headquarters, UNRWA. Its evaluation and recommendation read as follows:

"IV. Evaluation and Judgement

- a- The findings of the Board of Inquiry do not establish the involvement of the Appellant in the act of ration-coupons forgery and selling. It only reveals untrue and contradictory statements made by the Appellant.

- b- The Administration's decision to terminate the Appellant's services with the Agency were tainted by 'loss of confidence' in her, based on having 'valid reasons' to terminate her services in the interest of the Agency. However, the Board cannot conceive these valid reasons the result of which were the termination of the Appellant's service with the Agency together with the consequential social and professional inconveniences caused to her.
- c- The decision to terminate the services of the Appellant was triggered by the reporting of ration-coupons forgery and selling from outside the System. Such improprieties the System had failed, until that time, to detect.

V. Recommendation

In view of the foregoing, the Board unanimously makes its recommendation that the Administration's decision of 25 November 1991 in respect of the Appellant be reviewed with a view to reinstating the Appellant in her previous post as Staff Nurse or in any other post commensurate with her qualifications and in a manner that is not disadvantageous to her."

In a letter dated 7 June 1993, the Officer-in-Charge, Headquarters, transmitted a copy of the JAB report to the Applicant. He noted that "there were valid and objective reasons for the Administration to lose confidence in you" and informed her that he was unable to accept the recommendation that she be reinstated.

On 11 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant is innocent of the charges against her, and was not found otherwise by the Syrian authorities or by the UNRWA Board of Inquiry. As there is no foundation for the charges of misconduct, the termination is null and void.
2. The decision to terminate the services of the Applicant was motivated by prejudice and discrimination against her.

Whereas the Respondent's principal contentions are:

1. The Commissioner-General has the authority under area staff regulation 9.1 to terminate the appointment of a staff member in the interest of the Agency. The termination of the Applicant's appointment was within the discretionary authority of the Commissioner-General.

2. The decision to terminate the Applicant's appointment was premised on her conduct and was not improperly motivated. There is no evidence or indication of bias or prejudice.

The Tribunal, having deliberated from 21 October to 11 November 1994, now pronounces the following judgement:

I. The main evidence against the Applicant comes from a patient at the clinic where the Applicant worked and this patient's husband. They disclosed to the police an arrangement whereby the Applicant allegedly supplied the patient with forged ration cards for sale to Palestinian refugees, with the profits to be shared equally by the two women. The patient's husband said that the Applicant came to his home on 18 August 1991 and gave his wife seven cards (or twenty-eight coupons) and, as usual, he sold them. This and other related testimony of the patient and her husband was the only evidence relating to the Applicant to be disclosed in the procès-verbal furnished by the police.

The Board of Inquiry concluded that the Applicant did not tell the truth on a number of issues: denying that she knew the location of the patient's house, despite her written notes on the patient's ante-natal card and child record; stating that she had injected the patient on 30 July 1991, when the Board found that the date on the injection slip had been changed from 20 July 1991 to 30 July 1991, and suggesting that the patient was not seen by anybody to have fainted.

The Board of Inquiry also made other findings, which it obviously felt were of importance, such as the fact that the nursing

authorization forms were kept by the Applicant in the mother and child Health Room; that a relative of the Applicant had paid 20,000 Syrian pounds to the Syrian police, the motivation for which the Board questions if the Applicant were innocent; that the patient involved and her husband, having themselves confessed, implicated the Applicant. The Board asks why they should have accused the Applicant falsely.

II. The case against the Applicant on the issue of fraudulently handling the cards, therefore, comprises the evidence of the one patient and her husband and the Applicant's own somewhat dishonest response to questions asked during her arrest and investigation. Is this a sufficient case on which a conclusion could be drawn with any degree of certainty that the Applicant was implicated?

The Board of Inquiry implies that the Applicant was not only untruthful but had in fact delivered the ration cards to the patient and her husband for illegal sale. The actual finding of the Board, however, is merely that the Applicant was untruthful, not that she was guilty of the charges against her. Nor is there any finding by Syrian authorities against the Applicant. The record indicates that, in fact, she was not even charged.

III. The Tribunal's view is that the evidence is not sufficient to establish a finding that the Applicant was involved. Evidence of co-accused must always be looked at sceptically. It can never be regarded as being as reliable as that of a wholly disinterested party, as there could be many reasons why persons who are themselves accused would seek to implicate others. However, their evidence must be looked at in conjunction with the Applicant's own responses. Again there could be reasons other than guilt for the Applicant's untruthful responses, such as fear on her part in the face of accusations. The payment of 20,000 Syrian pounds, whether with or without the Applicant's knowledge, and whether or not it was subsequently repaid, can scarcely be regarded as definitive

evidence. It appears that the money was paid when she was incarcerated in order to effect her release.

IV. The Applicant goes further than simply denying involvement, offering an alibi for 18 August 1991, when it seems she was actually at a training session in Damascus with other staff members. The Agency dismisses this evidence as unimportant. The real issue, according to the Agency, is whether it had valid reasons to terminate the Applicant's services in the interest of the Agency under area staff regulation 9.1. The Agency adopts the stance that it is sufficient for the Agency to believe, on the balance of probabilities, that the Applicant was involved in irregular practices and that the Agency had legitimately lost confidence in her.

By implication, the Agency, therefore, appears to accept that the specific allegations made against the Applicant cannot be substantiated, certainly not with any degree of confidence. This, in the Tribunal's view, is a correct assessment of the evidence, which is clearly inadequate to make a positive finding.

V. If the central allegation against the Applicant, namely her involvement in illicit distribution of coupons, could not be proved, what then of the Agency's action in terminating her employment, pursuant to area staff regulation 9.1? This regulation provides, "The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency."

A decision to terminate an appointment is, of course, within the discretionary power of the Commissioner-General, who must exercise his discretion without improper motives, and in accordance with proper procedures.

The Respondent argues that the decision to terminate the Applicant's appointment was premised on the Applicant's conduct, which caused the Agency to lose confidence in her as an employee. The Respondent says that the decision was based primarily on the

Applicant's response to the charges against her, but notes also that her prior work record was poor. He contends that the Board of Inquiry finding, that the Applicant was untruthful, justified the decision even without a finding that she was guilty of the charges. The Respondent notes that "although she was not formally tried on these charges, there is no substantive evidence to support her claim that she was found to be innocent of those charges", suggesting the unacceptable proposition that she is guilty until proven innocent.

VI. The Tribunal does not accept this argument. A specific charge was made against the Applicant and the Respondent, in dismissing her, explicitly based his decision on the grounds that the Board of Inquiry had "found [her] guilty of having falsified UNRWA return coupons and having sold them." Although now conceding that the Board of Inquiry did not find the Applicant guilty, the Respondent persists in his argument that she really was guilty. Alternatively, he seeks other justifications for dismissing her, without regard to the fundamental requirements of due process. The Applicant should have been given the opportunity of dealing with these matters before her employment was terminated because of them. She should have been able to answer the allegations that her performance was poor or that she had threatened her supervisor if they were to be used as a basis for termination.

The Tribunal's view is that the Respondent acted improperly in purporting to dismiss the Applicant for matters which had not been established, or on which she was not afforded the opportunity to answer. The Tribunal, however, is not unmindful of the genuine concerns of the Respondent, given the generally unsatisfactory picture of the Applicant revealed by this entire episode. Nevertheless, in taking remedial action, the Respondent must act with regard for due process.

VII. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant compensation in an amount equal to two years of her net base salary as of the date of her separation from service.

VIII. The Tribunal makes no further order.

All other pleas are rejected, including the Applicant's requests for an oral hearing and for costs.

(Signatures)

Samar SEN
President

Samar Sen

Hubert THIERRY
Member

Hubert Thierry

Francis SPAIN
Member

Fr Spain

New York, 11 November 1994

R. Maria Vicién-Milburn
R. Maria VICIEN-MILBURN
Executive Secretary



Administrative Tribunal

Distr.
LIMITEDAT/DEC/682
11 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 682

Case No. 751: DABIT

Against: The Commissioner General
of the United Nations
Relief and Work Agency
for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry;

Mr. Francis Spain;

Whereas, on 13 May 1993, Costandi Awad Dabit, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees (hereinafter referred to as UNRWA), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 24 August 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"... to compensate him for the loss of earnings [due to] future unemployment, ... that he be compensated for the loss of opportunity ... due to unjustified dismissal.

Compensation & Damages	J.D.	9590.00
Loss of earnings (1990-1993)	J.D.	21950.00
Expected earnings due to promotion	J.D.	8260.00
	J.D.	39800.00

Add (at discretion of the Tribunal)

Loss of work opportunities cause by
unfair dismissal
Loss of earnings due to future
unemployment

J.D.

J.D.

J.D.

=====

...

... that his record be amended [accordingly] ... to clear him of the charges, and to allow him to resign rather than suffer dismissal [and that] as an alternative ... [the] Tribunal overturn the decision of the Joint Appeals Board and reinstate him in his former post."

Whereas the Respondent filed his answer on 21 January 1994;

Whereas the Applicant submitted an additional document on
1 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 30 April 1987, as a Senior Clerk at the Kalandia Vocational Training Centre, at the grade 7, step 1 level, on a temporary indefinite appointment, subject to a one-year probationary period. The Applicant was transferred to the post of Senior Clerk in the Administrative Services Division of the Jerusalem Field Office, with effect from 12 April 1988. On 20 February 1990, the Applicant's services were terminated, pursuant to staff rule 109.1.

In a letter dated 5 January 1988, the Field Personnel Officer, West Bank, informed the Applicant that complaints had been received concerning his work performance and official conduct. Specifically, he noted that the Applicant had "failed to pay a bill to a newspaper" and "did not prepare receipt vouchers for beds resulting in the loss of NIS [New Shekels] 77.30." The Field Personnel Officer noted that the letter would be considered a "written censure" to be placed in his personnel file, and instructed that NIS 77.30 be deducted from the Applicant's salary.

On 23 January 1988, the Field Finance Officer wrote to the Field Personnel Officer in reference to the letter of censure which had been sent to the Applicant. In his memorandum, he noted, "[f]rom the documentation available to me the payment [of the newspaper bill] was not delayed", and with respect to the receipt vouchers "[the Applicant] assured me that he did not receive the NIS 77.30 ... and, therefore, could ... not have issued a receipt voucher." He suggested that the deduction of this amount from the Applicant's salary was "not justified" and recommended that the letter of censure be withdrawn "as it is not based on enough evidence to justify such an action."

On 9 February 1988, the Field Personnel Officer notified the Applicant that he had been selected to fill the post of Senior Clerk in the Administrative Services Division of the Jerusalem Field Office. With effect from 12 April 1988, he was transferred to this post, at the same grade, with a six month probationary period. On 28 July 1988, the Applicant was injured in a traffic accident and was absent from work on medical leave until 1 January 1989.

On 11 April 1989, the Field Administration Officer met with the Applicant to discuss the concerns raised in a draft confidential letter, which he gave to the Applicant, informing him that he could not be confirmed in his post as Senior Clerk because his work was not up to standard. In particular, he noted that the Applicant was "twenty minutes late to work almost every day, in addition to reading newspapers and magazines during office hours", and that he did not cooperate with his colleagues. In a further letter, dated 26 April 1989, the Field Administration Officer informed the Applicant that his confirmation would be considered after three months, upon receipt of a performance evaluation report.

In September 1989, the Applicant's performance was evaluated by his supervisor, who gave him an overall rating of "2", i.e. "a staff member who maintains only a minimum standard of efficiency." In a letter dated 18 September 1989, the Field Administration Officer informed the Applicant that in view of his unsatisfactory work performance, his annual increment and confirmation in his post

would be deferred for three months. He noted that his letter was a "final warning" and that further complaints about the Applicant's work performance would compel the Agency to take action, which might include "the imposition of disciplinary measures leading to your separation from the Agency's service."

In a memorandum dated 22 December 1989, the Administrative Services Officer, West Bank, informed the Field Administration Officer, West Bank, that the Applicant's performance had shown "a marked improvement" and recommended that he be confirmed in the post of Senior Clerk and promoted to the grade 8 level. In a performance evaluation report dated 17 January 1990, the Applicant was given, by his supervisor, an overall rating of "3", i.e. "a staff member who maintains a good standard of efficiency". In signing the report on 18 February 1990, the Field Administration Officer noted his disagreement with this rating and referred to a memorandum, dated 9 February 1990, in which the Administrative Services Officer had informed him that another staff member was doing the Applicant's work, in addition to his own.

According to a Note for the record, prepared by the Field Administration Officer on 17 February 1990, on 16 February, an incident took place in the office involving the photocopying of external vacancy notices. The Applicant refused to undertake the photocopying and distribution of the announcements, on the grounds that it was not his job. He was told that he could be dismissed for insubordination and he was asked to leave the office, which he did. In a letter dated 19 February 1990, to the Field Administration Officer, the Applicant referred to prior communications regarding his job description and noted that most of what he did fell under the category of "such other duties as may be assigned," depriving him of his right to perform his official duties.

In a letter dated 20 February 1990, to the Applicant, the Director of UNRWA Operations, after listing the concerns which had been expressed regarding the Applicant's performance, including the incident of 16 February, concluded as follows:

"Based upon all the above, and additionally, a less than satisfactory periodic report, I regret to inform you that your service with the Agency is hereby terminated effective close of business on 20 February 1990 in the interests of the Agency under staff rule 109.1 ..."

In a letter dated 26 February 1990, to the Director of UNRWA Operations, the Applicant gave a different version of his record, including the incident of 16 February. He stated that the terms of his letter of appointment had not been observed and that he had been "delegated to perform less dignified work not provided for in the job description of my post." He requested that the decision to terminate his services be reviewed. In a reply dated 3 March 1990, the Director of UNRWA Operations confirmed the decision.

On 17 March 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 21 November 1990, the JAB adopted its report. Its conclusion reads as follows:

"The Board notes the provisions of staff rule 9.1 under which the Appellant's services were terminated and unanimously agreed that the Agency's decision to terminate the services of the Appellant was in order and in compliance with Staff Rules and Regulations, as well as with the terms and conditions of the Appellant's letter of appointment."

In a letter dated 18 December 1990, to the Commissioner General, the Applicant noted that the composition of the JAB which considered his case had been altered without notification to him. On 17 August 1992, the Director of Personnel, UNRWA, informed the Applicant that a new JAB would be constituted to consider his case. The JAB met between 7 and 9 December 1992. Its findings and recommendation read as follows:

"III. BOARD FINDINGS. ...

...

The Administration's decision of terminating the services of the Appellant as per its decision of 20 February 1990 had been utterly taken within the applicable Area Staff Rules and Regulations and the terms of the Appellant's letter of appointment.

IV. RECOMMENDATION

27. In view of the foregoing, the Board unanimously makes its recommendations that:

(a) The Administration's decision of 20 February 1990 be upheld, and

(b) The case be dismissed."

On 5 February 1993, the Commissioner General transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"... As you can see, the Board has unanimously recommended that the Administration's decision of 20 February 1990 to terminate your appointment be upheld and that your appeal be dismissed. I accept this recommendation and your appeal therefore stands dismissed."

On 13 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's employment under staff rule 109.1 was arbitrary. All disciplinary measures taken against the Applicant were vindictive. He committed no offence that would justify the termination of his services.

2. The JAB neglected to take into consideration documents submitted by the Applicant and ignored the Applicant's version of events, relying on the facts provided by the Respondent. The JAB's consideration of the case was therefore biased.

Whereas the Respondent's principal contention is:

The decision to terminate the Applicant's employment was a valid exercise of the Respondent's authority under area staff regulation 9.1. The decision was not improperly motivated.

The Tribunal, having deliberated from 21 October to 11 November 1994, now pronounces the following judgement:

I. The Applicant contends that the decision to dismiss him was taken arbitrarily and in the absence of any offence on his part. He says that all disciplinary measures taken against him are unfounded.

The Applicant's work history is not a happy one. He was first engaged in 1987 and by January 1988, he had received a letter of censure. However, this letter was questioned by the Field Finance Officer, who praised the Applicant for his work ability. This assessment was, in turn, criticized by the Principal at the Kalandia Vocational Training Centre.

The Applicant's career took an upward turn when, in a memorandum dated 22 December 1989, the Administrative Services Officer, West Bank, was able to note an improvement in the Applicant's work. He recommended that the Applicant's evaluation be reconsidered and that he be promoted.

On 16 February 1990, a disputed incident occurred. The Administration's version is that the Applicant refused to carry out a specific task, the Applicant's explanation being that as he could not do the task properly, he asked the Field Administration Officer's secretary to do it. Subsequent to this incident, the Applicant received his notice of termination.

II. The Respondent refers to a conference with the Applicant in April 1989, primarily to discuss his work performance and his standards of conduct, particularly his lack of punctuality, his reading of newspapers and magazines during office hours and the lack of cooperation with his colleagues. According to the record, a draft confidential letter was unofficially delivered by the Field Administration Officer to the Applicant at the meeting. The Applicant's performance was to be reviewed in three months, upon receipt of another performance evaluation report.

The performance evaluation report of 13 September 1989 showed that the Applicant's judgement and other personal factors were below standard as were his industry, quality of output and punctuality. He was therefore given a final warning in relation to work performance.

The memorandum of 22 December 1989 noted an improvement in the Applicant's performance. However, the Respondent says that, in the performance evaluation report of 17 January 1990, while the Administrative Services Officer noted an improvement in work performance and rated the Applicant's performance and conduct as satisfactory, the Applicant's Principal, who signed this report on 18 February 1990, disagreed with these findings. He stated that subsequent events had overtaken the ratings. These events were, according to the Administrative Services Officer, the discovery that the work of the Applicant was being done by another person and the incident which occurred on 16 February 1990.

III. Although the Agency had been unhappy with the Applicant before February 1990 and the Applicant was himself unhappy in his work and uncertain about the work that he was to perform, the turning point seems to have been the incident of 16 February. There is a conflict in the accounts of what occurred.

According to the Applicant, while carrying out photocopying work, he found the machine to be faulty. The Administrative Services Officer told him that this work was that of the Field Administration Officer's secretary. The secretary ordered the Applicant to carry out the work himself and directed him to a different machine. His response was that he had other things to do. He was then told by the Field Administration Officer to submit his resignation.

The Respondent's description of the incident is quite different. He says that the Applicant was requested by his principal supervisor to arrange for photocopying and distribution of material, the procedure having been arranged several weeks previously. The Applicant refused to carry out this work. When

ordered to do so by the Field Administration Officer, he, in the presence of other staff members, refused.

Even if the Applicant had been subjected to contradictory orders, as he claims, and even if he had been in doubt as to what exactly his duties were, surely he could reasonably have been expected to do what the Field Administration Officer told him to do, even if the message was communicated through the secretary.

From the history of the Applicant's work with the Agency, up to and including the incident in February 1990, there emerges no impression of bias or prejudice. There certainly was annoyance on the part of the Field Administration Officer. Even the Administrative Services Officer, who wrote the memorandum of December 1989, commending the improvement in the Applicant's work, wrote in the memorandum of 9 February 1990, that, for the previous 15 months, another staff member had been carrying out the Applicant's work as well as his own.

These were the circumstances in which the Applicant was dismissed. What of the Respondent's action in dismissing him?

IV. The Applicant's letter of appointment provided that "This appointment may be terminated at any time in accordance with the Staff Regulations and Staff Rules". This, of course, does not give the Respondent an unfettered right to dismiss. The termination was made pursuant to area staff regulation 9.1 which provides, "The Commissioner-General may at any time terminate the appointment of any staff member, if, in his opinion, such action would be in the interest of the Agency." The Respondent's power under the regulation must be exercised without improper motivation or abuse. The question, therefore, is whether there is evidence that the decision was procedurally defective or improperly motivated.

The thrust of the evidence is that, although the Applicant's work performance was less than satisfactory for, at least, a good part of his period of service, efforts were made to maintain him in the Agency. Both the Field Administration Officer and the

Administrative Services Officer, at different times, were positive in their actions towards the Applicant.

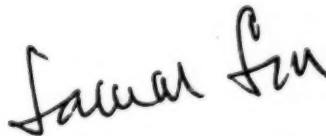
The Tribunal therefore finds, based on this evidence, that the decision to terminate the Applicant's appointment was a valid exercise of the Respondent's authority and should be upheld.

V. Finally, in relation to the Applicant's criticism of the Joint Appeals Board, the fact that the Board's report or recommendation does not discuss every piece of evidence or every submission does not invalidate its findings.

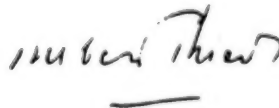
VI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

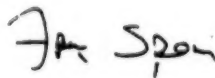
Samar SEN
President



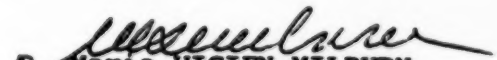
Hubert THIERRY
Member



Francis SPAIN
Member



New York, 11 November 1994



Maria VICIEN-MILBURN
Executive Secretary





Administrative Tribunal

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11 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 683

Case No. 747: KHALIL

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry;

Mr. Francis Spain;

Whereas, on 20 December 1992 and again on 22 April 1993, Rimón Farah Elias Khalil, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees (hereinafter referred to as UNRWA), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 August 1993, the Applicant, after making the necessary corrections, again filed an application requesting from the Tribunal that:

- "1. I be reinstated in the employment of UNRWA in a suitable job and the payment of my salaries from the date of my separation to that of reemployment.
2. Failing my reemployment, ... that payment of a compensation be made to me which should be:
 - i. Equal to my salary and benefits from the date of my separation to the date of the decision of your honourable Tribunal and
 - ii. [To obtain] a letter from UNRWA which can clear me of all implied accusations of dishonesty ... by UNRWA."

Whereas the Respondent filed his answer on 11 January 1994;
Whereas the Applicant filed written observations on 11 May
1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 December 1981, as a Distributor with the Jerusalem Distribution Team, at the grade 1 level. On 3 November 1989, the Applicant was suspended without pay. His appointment was subsequently terminated, pursuant to area staff regulation 9.1, with effect from 11 November 1989.

On 5 May 1989, the Commissioner-General directed that an audit of supply and warehousing operations be undertaken in the West Bank. This operational audit was carried out from 16 May to 15 June 1989. It included two surprise visits to the Jerusalem Area stores. In a "strictly confidential" memorandum, dated 21 June 1989, to the Director of UNRWA Operations, West Bank, the Auditor reported signs indicating "that pilfering or malpractice may be taking place". He suggested the establishment of "a Board of Inquiry to closely investigate the distribution operations at the Jerusalem Area stores."

A Board of Inquiry was established, composed of the Field Supply and Transport Officer, the Deputy Field Relief and Social Services Officer, a Legal Officer, and an Administrative Assistant as Secretary. The Board commenced work on 23 August 1989. It adopted its report on 9 September 1989, having conducted interviews with the Distribution Team Leader, the Team Checker, the Distributors, including the Applicant, and many others involved in the Jerusalem Area distribution. The Board concluded that five staff members, including the Applicant, were guilty of "serious misconduct insofar as they have been directly involved in the intentional misappropriation of commodities" and three staff members were guilty of "misconduct insofar as they committed serious dereliction of duty."

According to the Applicant, on 15 October 1989, his team was told to discontinue its distribution functions. On 1 November, they were told to resume their distribution functions. On that day, the Applicant and his Distribution Team were involved in an incident in the village of Biddo. In a report dated 2 November 1989, the Sub-Area Officer, Jericho, stated that, in response to a call he received on 1 November 1989, from a Biddo resident, he had gone to Biddo. He found 200 people surrounding the UNRWA Distribution Team and its truck. They allowed the truck to leave, on condition that they could send a delegation to the UNRWA office to brief senior staff and "put an end to the Team's irregularities." Several witnesses to the incident subsequently testified, on 2 November and on 6 November, that commodities were being sold by the Distribution Team. On 9 November 1989, 12 residents of Biddo signed a statement that they "do not agree that the distribution team who committed the embezzlement process on 1 November 1989 return to our village once more under any circumstances ..."

On 2 November 1989, the Director of UNRWA Operations, West Bank, informed the Applicant:

"... as the result of irregularities discovered by an audit and a board of inquiry into distribution of commodities with which you were involved, the Agency has decided, as a disciplinary measure, to suspend you without pay for a period of 30 days with effect from 3 November 1989 and upon completion of this suspension without pay to reassign you to the post of Sanitation Labourer, grade 01, in Jalazone Camp."

On 11 November 1989, the Director of UNRWA Operations wrote to the Applicant again, as follows:

"... the investigation of your involvement into irregularities in the distribution of commodities has been completed and as a result it has been decided to terminate your appointment in the interests of the Agency under area staff regulation 9.1 with effect from close of business today ..."

On 31 December 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 21 November 1990. Its findings read, in part, as follows:

"...

- The incidents of the Biddo village having occurred on 1 November 1989, the Board can only assume that the DUO/WB's [Director of UNRWA Operations, West Bank] letter was written in the full knowledge of these incidents and apparently in response to them.
- The Board notes also that in the above-mentioned letter, the DUO/WB had also decided to reassign the Appellant to a post of sanitation labourer in Jalazone camp, upon completion of his period of suspension.
- The Board finds it therefore difficult to accept the reasoning of the Administration in deciding on 11 November 1989 to terminate the services of the Appellant without submitting any evidence of new misconduct which could have justified the later decision.
- The Board believes that the chronological sequence of events and subsequent decisions is of the utmost importance and that, in all equity, no two separate decisions of varying severity could be taken in respect of one and the same case.
- The Board, therefore, recommends to the Commissioner-General to uphold the decision taken on 2 November 1989, assigning the Appellant to the post of Sanitation Labourer, grade 01, in Jalazone camp."

On 8 July 1992, the JAB transmitted its report to the Commissioner-General, noting:

...

2. Delay in submission of the report is due to belief of emergence of some evidence that could have led to a change in the recommendations of the Joint Appeals Board.
3. The Joint Appeals Board has reconsidered the case and accordingly confirms adherence to the recommendations made in the submitted report."

On 10 August 1992, the Officer-in-Charge, Headquarters, UNRWA, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"I regret to inform you that I cannot accept the Board's recommendation that you be transferred to the post of Sanitation Labourer in Jalazone Camp. I believe that the Board is mistaken in its assumption that the Administration was aware of the serious disturbances that had occurred at Biddo Village on 1 November 1989, when it wrote to you on 2 November 1989 about a transfer. I am satisfied that upon learning of that incident, the Administration decided to terminate your services in the interest of the Agency on 11 November 1989. I must therefore inform you that this decision will stand."

On 20 December 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was never charged verbally or in writing with misconduct and was not given an opportunity at any time to defend himself.
2. The Applicant's work was considered satisfactory. He did not violate any regulations or procedures pertaining to his work, or act in any immoral or dishonest manner.
3. Termination of the Applicant's services was unjust. He was a victim of collective punishment, which is against the principles of the United Nations.

Whereas the Respondent's principal contentions are:

1. The Commissioner-General has the discretionary authority under area staff regulation 9.1 to terminate the appointment of a staff member in the interest of the Agency.
2. The decision to terminate the Applicant's appointment was proper and not motivated by any improper motive. It was based on investigations which established that the Applicant was engaged in serious derelictions of duty, if not outright misconduct.

The Tribunal, having deliberated from 21 October to 11 November 1994, now pronounces the following judgement:

I. The Applicant's account begins with a description of his team being informed, on 15 October 1989, that it should discontinue its distribution functions. An interrogation of the team was carried out by four UNRWA employees as to how members carried out their functions in relation to distribution. Neither the Applicant nor any individual was accused of misuse of commodities.

On 1 November 1989, the team was ordered back to work. It went to the village of Biddo where, according to the Applicant, the team was attacked by two youths and certain goods were stolen. The security forces intervened and, after interrogation, the soldiers let the youths go with their booty.

According to the Applicant, on 2 November, the distribution team was given letters by UNRWA saying, in the Applicant's case, that he might be guilty of misconduct or serious misconduct. Specifically, it would appear that he had been involved in irregularities in the distribution of commodities. An investigation of these charges was being made. Pending its outcome, he was suspended from duty without pay, with effect from close of business 1 November 1989, in accordance with the provisions of staff rule 110.2. The Applicant says that he was never charged and never given an opportunity to defend himself.

On 11 November the Applicant was informed by letter that, as a result of the now completed investigation, it had been decided to terminate his appointment under area staff regulation 9.1, with effect from 11 November 1989. The Applicant says that he was not told what he was guilty of.

II. The Respondent gives a different account. He says that the Agency undertook an audit of the Supply, Distribution and

Warehousing Operations on the West Bank during the period 16 May to 15 June 1989. The auditor discovered irregularities in the Jerusalem stores, including excessive loading on trucks for daily distribution. He found more irregularities on a second visit.

As a result, a Board of Inquiry was established. Commencing on 23 August 1989, it held sessions until 9 September 1989, interviewing 18 witnesses, including the Applicant. The Board found that the Applicant, and others, had been involved in the misappropriation of commodities and in serious misconduct.

Having considered the Board's report, the Director of UNRWA Operations, West Bank, informed the Applicant on 2 November 1989, that, on the basis of the investigation, he was suspended for 30 days without pay. Thereafter, he was to be reassigned to the post of Sanitation Labourer. The Applicant, in his application, seems to be referring to a different letter, although of the same date.

The Respondent's account of the Biddo incident is that the team was accused publicly by the villagers of embezzlement or selling commodities intended for refugees and that an Agency official was able to calm down the situation only by promising to investigate these allegations. Subsequently, testimony was obtained that the Applicant was involved in the misappropriation of Agency goods.

Following the Biddo incident, the Director of UNRWA Affairs, West Bank, notified the Applicant, by letter of 11 November 1989, that his appointment was terminated.

III. The Applicant appealed to the Joint Appeals Board (JAB). While it could not determine whether the Agency had knowledge of the Biddo incident when it suspended the Applicant on 2 November 1989, the JAB recommended, on the assumption that the Administration was in possession of this information, that the decision to assign the Applicant to a new post be reinstated and the decision to terminate his appointment be rescinded.

Subsequently, the Deputy Commissioner-General stated that he was satisfied that the Field Director was not aware of the Biddo incident when he wrote to the Applicant on 2 November 1989 that he had been suspended and reassigned to a new post.

IV. The Tribunal accepts the account of the enquiry which was carried out in August and September 1989, although in his application the Applicant makes no reference to it. The Applicant had an opportunity to give his account of his work and would, presumably, have had an opportunity to answer any allegation made against him. However, it is unclear whether specific allegations were presented to him at that time.

The Tribunal also accepts that the Administration did not know of the Biddo incident when the letter of 2 November 1989 was written. The decision to suspend and reassign the Applicant in the aftermath of the enquiry was fully justified by its findings. Indeed it could be regarded as generous.

The Tribunal has no difficulty in accepting the Respondent's account of the Biddo incident, but it notes that the Applicant was not afforded an opportunity to respond to the allegations made concerning the incident.

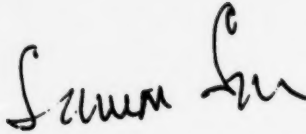
V. While the Tribunal concludes that the Respondent's action in dismissing the Applicant was fully justified, it is troubled by the Applicant's contention that he was never charged with misconduct or given an opportunity to defend himself. The record supports this contention, indicating that the Applicant was notified of the findings of the two investigations against him, without having been formally charged. The Tribunal holds that the Applicant is therefore entitled to compensation.

VI. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant three months of his net base salary at the rate in effect on the date of his separation from service.

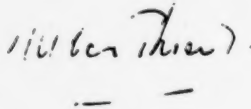
VII. All other pleas are rejected.

(Signatures)

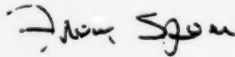
Samar SEN
President



Hubert THIERRY
Member



Francis SPAIN
Member



New York, 11 November 1994



R. Maria VICIEN-MILBURN
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/684
11 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 684

Case No. 739: ABDUL RAHIM

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, President; Mr. Hubert Thierry;
Mr. Francis Spain;

Whereas, on 23 June 1993, Iffat Fu'ad Abdul Rahim, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA), filed an application containing a request for the production of certain documents and, inter alia, pleas for:

"...

2. Reinstating the Applicant to service, and considering her on special leave with full pay ever since she applied for reinstatement, i.e. September 1987.

3. Compensating the Applicant for the loss and injury she sustained estimated at USD 40,000.

4. Payment of secretarial and legal counsel's fees estimated at USD 2,000."

Whereas the Respondent filed his answer on 23 December 1993;
Whereas the Applicant filed written observations on
20 February 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 4 September 1961, as a Teacher at the Beisan School, Hama, North Area, on an indefinite appointment, at the grade 5 level. She was subsequently transferred to other schools in the Damascus Area. The Applicant resigned, with effect from 1 October 1986. The Applicant was employed again by UNRWA on a temporary basis, with effect from 7 October 1987, as a Teacher at the Nimreen School, Damascus Area, at the grade 6 level. Her temporary employment ended, with effect from 1 November 1987, following a memorandum from the Applicant to the Field Education Officer, which read, "I request stopping work with effect from 1 November because I refuse appointment on temporary basis."

On 29 June 1977, prior to the Applicant's first resignation, UNRWA issued staff circular No. A/5/77, advising UNRWA staff that:

"The Agency has agreed to amend the relevant Personnel Directive to provide that if a teacher resigns from the Agency to accept another teaching post within the Middle East and he subsequently applies for re-employment by reinstatement within two years from the date of resignation, the Agency will give him priority over new candidates who are equally qualified."

With effect from 1 July 1980, personnel directive A/4/Rev.4/Amend.9, Section 3.6, extended the period of priority for re-employment of teachers from two years to three years from the date of resignation.

On 23 April 1992, the Applicant wrote to the Field Personnel Officer, Damascus, referring to a recent interview with the Director of UNRWA Affairs, SAR. She enclosed an application form for the post of Teacher.

In a reply dated 26 April 1992, the Field Administration Officer, SAR, noted that when the Applicant voluntarily resigned from the Agency's service in 1986, she had been paid all benefits due to her and ended her contractual relation with the Agency. He noted that her subsequent temporary appointment was terminated at

her request on 1 November 1987, and that she was not entitled to any further termination benefits. With respect to her request for re-employment, he stated:

"... At the time you left the Agency, teachers who applied for re-employment within three years from the date of their resignation were given priority over new candidates who were equally qualified, but not over better qualified candidates. Besides, it appears that you resigned from employment with the Agency more than three years ago. All former staff members, including teachers, who seek re-employment with UNRWA are simply viewed as external candidates and have no priority whatsoever in employment."

On 27 May 1992, the Applicant wrote to the Field Administration Officer, SAR, noting, inter alia, that she had been applying continually for reinstatement since September 1987. Her applications in 1988, 1989, 1990, and 1991 were "with no avail on the ground that I am over age, i.e. over 35 years." She noted that she had already been older than 35 years when she resigned on the basis of the rules that provided for priority reinstatement within three years, and she requested permission to appeal directly to the Administrative Tribunal.

In a reply dated 6 July 1992, the Field Administration Officer, SAR, stated: "The Agency's position is that there is no decision that can be appealed from and, therefore, we cannot agree to your request."

On 19 July 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 29 March 1993. Its findings and recommendation read, in part, as follows:

"III. Board Findings, ...

12. ... The Board focused on the content of paragraph 3.6 of personnel directive A/4 Rev.4 Amend.9 effective 1 July 1980 titled 'Reinstatement of Teachers' and contends that it does not invoke a contractual relation between the Agency and the Applicant in any sense.

13. The Board also considered appeal procedures as stipulated in area staff rule 111.3 and which provide that only 'a staff member' can file an appeal against a disciplinary measure or anything that touches on the terms of his/her appointment.

14. In this context the Board finds that the Applicant's case does not qualify to invoke the competence of the Board as the matter raised is outside its jurisdiction and at the material time of the application, the Applicant did not enjoy the status of a staff member of the Agency.

IV. Recommendation

15. In view of the foregoing, the Board submits it lacks jurisdiction to entertain such an appeal and therefore, without prejudice to any other submissions as may become necessary, unanimously makes its recommendation to declare this appeal unreceivable."

On 13 May 1993, the Commissioner-General transmitted a copy of the JAB report to the Applicant, and informed her that he accepted the JAB's recommendation.

On 23 June 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB ruled unfavourably on the Applicant's case, and her application to the Tribunal was filed within the time-limits provided by the Statute and Rules of the Tribunal. It is therefore receivable.

2. The Applicant had the right, at the time she resigned from the Agency, to priority consideration for re-employment within three years of her resignation.

3. The decision of the Respondent not to reinstate the Applicant is flawed by mistake of fact, error of law, prejudice against acquired rights, age discrimination, and unjust enrichment.

Whereas the Respondent's principal contentions are:

1. The Tribunal does not have jurisdiction over the matters raised by the Applicant, as the Area Staff Regulations and Rules

governing her appointment when she resigned from service and when she applied for re-employment did not provide for such jurisdiction.

2. The Applicant's claim against the Respondent is time-barred, as she seeks review of an Agency decision made in 1987 and did not file an appeal with the JAB until 19 July 1992.

3. The decision as to whether to re-employ the Applicant is inherently discretionary. The Applicant does not make any allegation of prejudice in the Respondent's decision.

The Tribunal, having deliberated from 21 October to 11 November 1994, now pronounces the following judgement:

I. At the outset, the Tribunal considered the Applicant's preliminary pleas asking the Respondent to produce certain documents and concluded that the material before the Tribunal was adequate for examining the principal issues in this case. Accordingly, the request for further documents was denied.

II. The main questions raised by the Applicant are practically the same as those the Tribunal considered in its Judgement No. 650, Bakr et al. Judgement No. 650 was rendered on 20 July 1994, while the present application was filed on 23 June 1993, i.e. about a year before Judgement No. 650. In that judgement, the Tribunal discussed the issues and came to some definitive conclusions which are applicable in this case.

III. First, the Tribunal held that the local UNRWA staff governed by the Area Staff Regulations cannot be deprived of, far less totally denied, their right to be properly heard by an independent judicial body. In this context, the Tribunal took the view "that it was not precluded from hearing cases involving staff members such as the Applicants, there being no other judicial forum for dealing with such." After referring to the Advisory opinion of the International

Court of Justice of 13 July 1954, the Tribunal concluded that there was no justification in "fairness and equity" to deny the Applicant(s) as area staff members recourse to an external judicial body while allowing such recourse for international staff members. Therefore, consistent with its previous ruling, the Tribunal rejects the plea that it is without competence "*ratione materiae*". For similar reasons of fairness and justice, the Tribunal could not endorse the view that because of practical and administrative difficulties, the staff members governed by Area Staff Regulations should be denied the basic elements of justice.

IV. The Respondent's argument, which denies the competence of the Tribunal on the ground of *ratione temporis*, must also fail as, at the time of the revision of the Area Staff Rules, in June 1991, there was no indication that the old system (of no recourse to the Tribunal and only a limited system of internal recourse in the event of termination) would continue to prevent staff members from seeking redress from the Tribunal. "If it had been the intention to perpetuate that position, the provision extending the jurisdiction of the Tribunal should have provided expressly for this result." (Judgement No. 650, *Bakr et al.*, paragraph XVIII)

V. Inasmuch as the Applicant was a former staff member, the contractual obligations between the parties may be considered to subsist and may affect any prospective actions related to the earlier employment. This indeed is the view the Tribunal took in Judgement No. 650, holding that "the fact that the Applicants were not staff members does not necessarily deprive them of recourse. These, of course, are former staff members who filed appeals relating to alleged non-observance of the terms of their contracts of employment." (Judgement No. 650, *Bakr et al.*, paragraph XIV)

VI. The Tribunal finds that the Applicant was not given priority when she originally applied for re-employment within the requisite

time period. The Tribunal notes that the Applicant applied several times for re-employment and finds that she is not time-barred in her application because her efforts to gain re-employment were continual. They began well within the period during which she was entitled to priority consideration and they continued to 1992, culminating in her decision to seek recourse. Although there is no guarantee that the Applicant would have been re-employed even if she had been given priority, she suffered a denial of rights for which she is entitled to compensation.

VII. The Applicant notes that requirements for the employment of teachers were changed and that she was consequently denied consideration on the basis of factors which were not present or known to her when she resigned. The Tribunal considers that the Applicant's right, as a former teacher, to priority consideration for re-employment within three years of separation, should not have been eclipsed by the imposition of requirements, without her knowledge, which made priority consideration of her re-employment impossible.

VIII. In view of the foregoing, the Tribunal orders that:

(i) The Applicant be accorded priority for the teaching posts in UNRWA for which she applies and for which she is qualified; and

(ii) If the Applicant is not appointed within 9 months from the date of this judgement to a suitable post in UNRWA, the Respondent pay to the Applicant compensation, for the injury referred to in paragraph VI above, equivalent to 12 months of her net base salary at the rate in effect at the time of the Applicant's resignation.

(iii) All other pleas are rejected.

(Signatures)

Samar SEN
President

Samar SEN

Hubert THIERRY
Member

Hubert Thierry

Francis SPAIN
Member

Francis Spain

New York, 11 November 1994

R. Maria VICIEN-MILBURN
R. Maria VICIEN-MILBURN
Executive Secretary





Administrative Tribunal

Distr.
LIMITED

AT/DEC/685
11 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No 685

Case No. 722 : LOGUINOV

Against : The United Nations
Joint Staff Pension
Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of: M. Samar Sen, President; M. Hubert Thierry;

M. Mayer Gabay;

Whereas at the request of Evgueni Loguinov, a staff member of the United Nations Industrial Development Organisation (hereinafter referred to as UNIDO), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 31 January 1993;

Whereas, on 3 November 1992, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 31 March 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to order the rescission of the decision by the Standing Committee of the United Nations Joint Staff Pension Board (the Board), upholding the decision by the Secretary of the Board, to deny the Applicant his right to restore prior contributory service with the Fund;

Whereas the Respondent filed his answer on 29 April 1994;

Whereas the Applicant filed written observations on 26 May 1994;

Whereas the Applicant filed further written observations on 10 August 1994;

Whereas the facts in the case are as follows:

The Applicant first served the Organisation from 1967 to 1972, on secondment from the USSR Government, as a Translator/ Reviser at the P-4 level, in the Russian Translation Section of the United Nations Secretariat in New York. He was a participant in the United Nations Joint Staff Pension Fund (the Fund) from 23 October 1967 to 7 September 1972. Upon separation he was paid a withdrawal settlement, in accordance with his payment instructions. The Applicant rejoined the service of the Organization from 1974 to 1979, again on secondment, and re-entered the Fund as a participant on 20 October 1974. He did not restore his prior period of contributory service. On 29 December 1979, the Applicant separated from the Organization, opting again for a withdrawal settlement, which was paid to him in February 1980, in accordance with his payment instructions.

In 1981, after the Applicant had separated from the Organization for the second time, and before he entered service again for the third time, identical transfer agreements were concluded between the Fund and the USSR, the Ukrainian SSR and the Byelorussian SSR. These agreements enabled staff members to transfer pension rights from the Fund to the Social Security Fund of these countries.

On 4 November 1984, the Applicant entered the service of UNIDO, on secondment from the USSR Government, and again became a Fund participant. In early 1986, following the Tribunal's Judgement 360, Taylor, the Applicant was informed that he had the right to restore his periods of prior contributory service in the Fund. On 9 May 1986, he completed form PENS C/1, electing to restore his two prior periods of service. On 2 February 1987, the Secretary of the Board wrote to the Applicant regarding the amount he had to pay in order to effect the restoration, pointing out that he had the option to pay this amount in a lump sum or in specified monthly

instalments. The letter stated, "the remittance of a lump sum or the commencement of the instalments is expected within 90 days of the date of this memorandum, otherwise your right to restore will be deemed to be cancelled." The Applicant made no payment.

On 13 September 1990, the Applicant resigned from the Ministry of Foreign Affairs, with effect from 30 September 1990. His subsequent letter of appointment, with effect from 4 November 1990, made no reference to secondment. Under "Special Conditions", it noted: "On assignment from UN HQ". On 30 November 1990, the Secretary of the Board, in reply to a query dated 26 November 1990, from the Secretary of the UNIDO Staff Pension Committee concerning the Applicant, stated that the Applicant's right of restoration had been deemed cancelled in view of his failure to make the required payment, pursuant to administrative rules F.3 and F.4 of the Fund. This letter was forwarded to the Applicant, who wrote to the Secretary of the Board on 12 December 1990, explaining that he had been on secondment from the Government of the USSR until his resignation from government service in October 1990. He stated that "all the matters concerning my pension rights - its transfer, restoration, etc., including its disposal - had been handled by my government." With effect from 3 November 1990, he noted that he was "with UNIDO as a free agent" and suggested several alternative methods of lump sum and monthly payments that he might make to cover the period since 2 February 1987, for restoration of his prior periods of contributory service.

In a reply dated 14 January 1991, the Secretary of the Board informed the Applicant that his right of restoration was not affected by his secondment status. He noted that the Applicant had the right to request restoration of prior contributory service, and that he had actually done so, but that as payment had not been made within the applicable time limit, the right of restoration had been cancelled.

In July 1991, the Board decided to permit Fund participants from the former USSR, Ukrainian SSR and Byelorussian SSR, who had transferred their UN Pension Fund rights to the USSR Social Security

Fund, in accordance with the transfer agreements between the Fund and these governments, to restore their prior contributory service. In a letter to the Secretary of the Board, dated 14 October 1991, the Applicant renewed his request for restoration on the basis of this decision. In a reply dated 1 November 1991, the Secretary of the Board informed the Applicant that the Board's 1991 decision did not apply in his case, as he had not transferred his pension rights under these agreements.

In a letter dated 14 February 1992, the Applicant requested a review by the Standing Committee of the Board of the decision by the Secretary of the Board. On 2 July 1992, the Standing Committee considered the Applicant's case, and on 27 July 1992, the Secretary of the Board informed the Applicant that the Standing Committee had upheld the Secretary's decision to deny the Applicant's request for restoration. The letter reads, in part:

"... Under the circumstances of your case, no other Fund participant could restore his or her prior contributory service: having been advised of the payment required to effect the restoration, you had failed to make the necessary restoration payment(s) in accordance with the Fund's administrative rule F.3, and consequently your right of restoration was deemed to be cancelled under administrative rule F.4 ..."

On 31 March 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. While on secondment, the Applicant was unable to exercise his pension rights freely, as forced deductions by the USSR Government from his salary prevented him from meeting the financial terms required for restoration.
2. The Fund's administrative rule F.3 should not apply. The Applicant's case should be regarded as exceptional, as circumstances beyond his control made it impossible for him to comply with the Fund's Rules.

3. By opting for the UN pension, the Applicant lost his national pension rights. The possible loss of UN pension rights for the ten years of his previous service, and the loss of national pension under the extraordinary circumstances of the dissolution of the USSR, leaves the Applicant in a precarious position and should be taken into account.

Whereas the Respondent's principal contentions are:

1. There is no discretion vested in the Secretary of the Board with respect to the right of restoration, which is granted under clearly delineated circumstances.

2. By failing to meet the conditions in the Regulations and Rules of the Fund, the Applicant lost his restoration rights. The reasons for the failure are not relevant.

3. The conditions of the Applicant's secondment by the USSR Government have no bearing on the Applicant's entitlement under the Fund's Regulations.

The Tribunal, having deliberated from 27 October to 11 November 1994, now pronounces the following judgement:

I. The issue on which the Tribunal is asked to make a decision is a narrow one: Should it uphold the decision of the Standing Committee of the Board, confirming the ruling by the Secretary of the Board which denied to the Applicant the right to restore prior periods of contributory service from 23 October 1967 to 7 September 1972, and from 20 October 1974 to 29 December 1979. The reason given for the denial was the failure by the Applicant to comply with the requirements of rule F.3 of the Administrative Rules of the Fund regarding payments to be made, if he wanted the restoration for which he had applied, to take effect.

II. The Applicant asks the Tribunal to rescind that decision because he claims it is based on strictly legal grounds and ignores

his situation as a staff member who, at the relevant time, was on secondment from the Government of the former USSR. This, he asserts, made it impossible for him to comply with the Administrative Rule cited above. He claims he should, therefore, be allowed to restore despite his non-compliance with that Rule.

III. The Applicant cites only one reason bearing directly on his alleged inability to comply with administrative rule F.3. For the rest, the Applicant objects to the general policy of the Government of the former USSR in regard to the pension rights of their seconded officials. He refers to the problems of those who were covered by a Transfer Agreement between the Fund and the USSR. The Applicant's right to restore the periods in question had not, however, been affected by this agreement, which came into force only in 1981, after the Applicant had separated from service in 1979.

IV. The one contention bearing directly on the Applicant's alleged inability to comply with the requirements of administrative rule F.3 is the assertion that "as a pre-condition for granting me secondment, the Government had wrung from me the pledge to surrender to it some 50 per cent of my UN salary, as well as my UN pension rights at the end of my service with the United Nations."

V. This assertion, pointing to the reported practice of the former USSR, does not, however, explain the Applicant's failure to comply with administrative rule F.3. That rule applies only after a participant has elected to restore prior service, which the Applicant did by completing the requisite forms (PENS C/1) on 9 May 1986. If at that time his situation was as he describes it, it is not clear what was the purpose of his request to restore, as he seemingly neither had the money to pay for the restoration nor would have derived a benefit from it, even if he could have made the payment required.

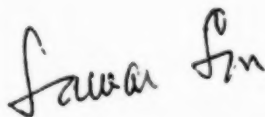
VI. Knowing the penalty for failure to comply with the conditions for payment if his request was accepted, namely that his right to restore would be lost irrevocably, under administrative rule F.4, there was no evident reason for the Applicant to seek restoration at that time. Nevertheless, the Tribunal must take into account that he did in fact ask for the restoration of his pension rights and that he must bear the consequences.

VII. The Tribunal, while not unaware of or unsympathetic to the problems apparently faced by the Applicant and others in similar situations in respect of their pension rights, is unable to find that in this particular case, they would legally permit derogation from the application of the Regulations and Administrative Rules of the Fund.

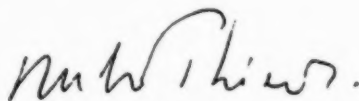
VIII. The Tribunal, for the reasons set forth above, finds that the decision of the Standing Committee of the Board, denying to the Applicant the right to restore the prior service in question, should be upheld, and rejects all claims by the Applicant.

(Signatures)

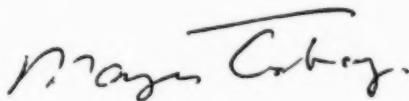
Samar SEN
President



Hubert THIERRY
Member



Mayer GABAY
Member



New York, 11 November 1994



R. Maria VICIEN-MILBURN
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/686
11 November 1994

ORIGINAL: ENGLISH
FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 686

Case No. 644: REBIZOV

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, Vice-President, presiding;
Mr. Hubert Thierry; Mr. Francis Spain;

Whereas on 10 January 1992, Alexei Nikolayevitch Rebizov, a
former staff member of the United Nations, filed an application
requesting the Tribunal, inter alia, to:

"...

- Quash and nullify the decision rendered on 13 June 1990
by [the] Chief, Personnel Service (...);
- Quash and nullify the decision of 14 October 1991 (...);
- Quash and nullify any evaluation of my job performance
made after November 1989;

...

- Order that I be reinstated, as from 15 June 1990, as a
United Nations staff member with all effects deriving
from the Staff Regulations;

...

- Order that I be reinstated immediately as a United
Nations staff member;

...

- Order that my contract with the United Nations be extended until 14 January 1991, with all effects, including pecuniary ones, deriving from the Staff Regulations and my contract."

Whereas the Respondent filed his answer on 8 March 1994;

Whereas the Applicant filed written observations on 7 October 1994;

Whereas the Tribunal put questions to the Respondent on 14 October 1994, to which he provided answers, together with supporting documents, on 25 and 26 October 1994.

Whereas, on 2 and 3 November 1994, the Applicant requested the production of further documents and commented on the Respondent's submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 January 1989, as an Associate Translator in the Russian Translation Section in the Department of Conference Services of the United Nations Office at Geneva (UNOG), on a one year fixed-term appointment. His letter of appointment noted, under "Special Conditions," that he was "on secondment from the Government of the Union of Soviet Socialist Republics."

On 17 November 1989, the Chief of the Russian Translation Section completed a performance evaluation report (PER) for the Applicant from 15 January through 18 November 1989, giving him four "C"s (Good), six "B"s (Very Good) and one "A" (Excellent), and noting "[h]e is loyal to the United Nations." The PER was signed by the Chief of UNOG Languages Service on 21 November 1989, with an overall rating of a "good performance." On 22 January 1990, the PER was signed by the Applicant.

On 5 December 1989, the Chief of the Russian Translation Section recommended, to the Officer-in-Charge of UNOG Languages Service, a six-month extension of the Applicant's appointment, which was due to expire on 14 January 1990. On 22 December 1989, the

Chief of UNOG Languages Service recommended to the Chief of Personnel Service a one-year extension of the Applicant's appointment.

On 26 February 1990, the Applicant, along with two other USSR staff members, sent a letter to the Permanent Representative of the USSR to UNOG, charging that practices were still being followed which forced them to violate the UN Charter and their oath of office and listing some of them. They concluded by recording their "refusal to fulfil departmental directives incompatible with the standards and principles of the international civil service and the UN Charter."

In a cable dated 4 April 1990, an official at the Office of Human Resources Management (OHRM) at Headquarters communicated to UNOG its approval of the recommendation to extend the Applicant's appointment for one year, "subject to Government concurrence." On 18 April 1990, the Chief of the Russian Translation Section wrote to the Chief of the UNOG Languages Service, recalling that the Section had recommended a six-month extension of the Applicant's contract, which had nevertheless been extended for one year. He noted that the Applicant's performance "has not since shown any signs of changing for the better." In view of the "steadily inadequate quality of his work," he requested that the question of "terminating [the Applicant's] contract after the 6-month period initially proposed" be reconsidered.

In a reply dated 24 April 1990, the Chief of the UNOG Languages Service expressed regret that the Applicant's performance had not improved. She noted that Headquarters had approved a one year extension "subject to Government concurrence" which had not yet been received. She said the Applicant would be given a short-term contract "to cover the period until a reply is received from the Soviet authorities." She reaffirmed that the recommendation for a one year extension of the Applicant's contract was "to allow him the

normal training period of two years" and concluded that "the decision concerning the extension of his contract now rests with the Soviet authorities."

On 30 April 1990, OHRM at Headquarters cabled UNOG, in part, as follows:

"... OHRM HAS RECEIVED GOVERNMENT CONCURRENCE TO EXTEND [THE APPLICANT'S] FIXED-TERM APPT [APPOINTMENT] ONLY THROUGH 14 JUNE 1990 REPEAT 14 JUNE 1990 SINCE THERE ARE SERIOUS GRIEVANCES AGAINST HIS PERFORMANCE. ..."

The Applicant was successively granted three fixed-term appointments, through 14 June 1990. The Personnel Action form effecting the first extension, through 15 March 1990, describes it as an "[e]xtension of fixed-term appointment for a period of one year through 14 January 1991." The section of the form headed "Remarks" notes that it was an "[i]nterim extension pending receipt of Government concurrence." The three letters of appointment each stated, as a special condition, that the Applicant was "on secondment from the Government of the USSR."

On 14 May 1990, the Applicant wrote a letter to the Permanent Representative of the USSR Mission to UNOG. Referring to his earlier letter of 26 February 1990, he noted that he and the other two staff members who wrote the letter had since "been under constant pressure and received various threats from the officials of the Soviet Mission," and that he personally, because of the pending extension of his appointment, had become "the main target of those retaliatory measures." He stated that, in a private conversation, in March 1990, the USSR Deputy Ambassador had proposed a four-year extension of his contract in exchange for withdrawal of the letter. As a result of his refusal, the Chief of the Russian Translation Section was attempting to discredit his performance "to provide a fallacious justification for the non-renewal of [his] contract."

On the same date, the Applicant sent a copy of his letter to the Assistant Secretary-General for OHRM and requested protection "in view of the seriousness of the threats." He also stated his concern that the Chief of the Russian Translation Section was "wilfully endeavouring to discredit my performance and conduct in order to provide a fallacious ex-post-facto justification for his attempts to curtail the normal renewal of my service."

On 29 May 1990, the Applicant wrote to UNOG's Chief of Personnel Service and requested an extension of his appointment. In a reply dated 1 June 1990, a Personnel Officer informed him, "approval for the extension of your contract was given until 14 June 1990 and we do not have, therefore, the authority to extend your appointment".

In mid-May 1990, the Applicant requested the Panel on Discrimination and Other Grievances (the Panel on Discrimination) to investigate his case. On 1 June 1990, a memorandum was sent from the Panel on Discrimination to UNOG's Chief of Personnel Services, requesting that the Applicant's contract be extended for two months, so that the Panel on Discrimination could complete its investigation.

On 5 June 1990, the Chief of the Russian Translation Section wrote to the Panel on Discrimination, noting that their obligation to act expeditiously was inconsistent with a request for extension. He recalled his previous comments to the effect that his request for the termination of the Applicant's contract was "predicated only on his consistently inadequate performance as a United Nations translator." He also recalled that "the Government concurrence in [the Applicant's] case is only through 14 June 1990."

On 13 June 1990, the Chief of Personnel Services, UNOG, responded to the Panel on Discrimination's request of 1 June 1990, inter alia, as follows:

"Please be informed that, in the absence of his Government's concurrence for an extension of the period of secondment, the Office of Human Resources Management is unable to extend [the Applicant's] appointment beyond 14 June 1990."

On 13 June 1990, the Panel on Discrimination informed the Assistant Secretary-General for OHRM that, as its request for an extension of the Applicant's appointment had been rejected, it could not proceed with the examination of the case.

Also, on 13 June 1990, the Chief of Personnel Service, UNOG, wrote to the Applicant that, "in the absence of Government concurrence for an extension of the period of secondment, the Office of Human Resources Management is unable to extend your appointment beyond 14 June 1990."

On 14 June 1990, the Applicant separated from the Organization. On 29 June 1990, he requested political asylum from the Swiss Government, which was granted on 14 May 1991.

On 13 August 1990, the Applicant wrote to the Secretary-General and requested a review of the administrative decision not to extend his appointment. On 21 November 1990, he requested the Secretary-General to agree to the direct submission of his appeal to the Administrative Tribunal. On 16 January 1991, the Assistant Secretary-General for OHRM advised the Applicant of the Secretary-General's agreement thereto. On 22 May 1991, a UNOG Joint Working Group, set up following UNAT Judgement No. 482 to consider the case of staff members "on secondment" whose appointments were not renewed and who had filed timely appeals took up the Applicant's case. On 14 October 1991, the Applicant was notified of the results of the review undertaken on his case by UNOG's Joint Working Group and of the Group's conclusion that his appointment would not have been extended, even if he had not been on secondment.

On 10 January 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's criticism of the practice of secondment and his criticism of the treatment of UN staff of USSR nationality by their Government led to the Respondent's decision not to extend his appointment.
2. The decision not to extend the Applicant's appointment beyond 14 June 1990 was based solely on the USSR Government's refusal to give its concurrence for an extension, and violates Article 100 of the Charter and the provisions of personnel directive PD/9/59, which provides that translators are to be recruited for a minimum period of two years.
3. Staff members who were called upon to assess the Applicant's performance discriminated against him, and any evaluation report of the Applicant's performance after November 1989 is invalid as he was not interviewed for and did not sign any such report.

Whereas the Respondent's principal contentions are:

1. The Joint Working Group was established to provide independent and objective consideration of staff members based solely on their performance and the interest of the Organization, irrespective of the views of their Governments.
2. The Applicant's case was given proper consideration by UNOG's Joint Working Group. The decision not to reappoint the Applicant was fair and objective and fully respected his rights under the Staff Regulations and Rules.
3. The Applicant had no entitlement, including any legally cognizable expectancy, as regards continued employment on expiry of his fixed-term contract.

The Tribunal, having deliberated from 12 October to 11 November 1994, now pronounces the following judgement:

I. The Applicant's claim arises from his employment with the UN from 15 January 1989 to 14 June 1990. The Applicant was employed as a Translator with UNOG, for one year, from 15 January 1989. In January 1990, the Chief of Personnel Administration sought approval from OHRM for a one year extension of the Applicant's appointment. This approval was given in early April 1990, "subject to Government concurrence". Although the Chief of Languages Service, in April 1990, reaffirmed her recommendation that the Applicant's contract be extended for one year, the Applicant was granted extensions of his contract for only five months, i.e. until 14 June 1990.

During this entire period, the Applicant was erroneously considered to be on secondment from the USSR. The basis on which he was employed by the Organization did not conform to the standards for a valid secondment, discussed by the Tribunal in Judgement No. 482, Qiu, Zhou and Yao (1990). All the evidence, including the letters addressed to the Applicant by a Personnel Officer on 1 June 1990 and by the Chief of Personnel Services on 13 June 1990, clearly establishes that the non-extension of the Applicant's contract past 14 June 1990, was due to the lack of consent by the authorities of the USSR.

A strong presumption can be made that protests by the Applicant, such as the one of February 1990, against certain alleged practices by the USSR authorities with respect to staff members considered by them to be on secondment, including interference in their work, was the basis for the lack of consent by the USSR Government to the extension of the Applicant's contract beyond 14 June 1990.

II. The Applicant was thus wrongly separated from the Organization on 14 June 1990. After the Tribunal rendered Judgement No. 482, the Applicant's situation was reviewed by the Administration under provisions promulgated by the Secretary-General for implementing that judgement. (Cf. Judgement No. 559, Vitkovski and Rylkov (1992)). Accordingly, the Applicant's case was subsequently submitted to a Joint Working Group at UNOG for

consideration of whether he should receive a further appointment. The report of the Joint Working Group dated 22 May 1991, states, in part:

"...

2. During the meeting of the Working Group held on 22 May 1991, the Chief of the Russian Translation Section expressed his strong reservations about [the Applicant's] performance. He qualified him as the least capable junior translator and did not recommend any extension.

3. The Chief of the Languages Service added that she was convinced that [the Applicant's] performance left much to be desired and therefore she would not recommend him for any extension. In the light of [the Applicant's] performance the members of the Working Group share these views."

The Respondent argues, on the basis of this report, that even if the Applicant had not been on secondment, his appointment would not have been renewed.

III. Because of the significance of this contention by the Respondent, the Tribunal directed questions to the Administration and to the members of the Joint Working Group with regard to the 22 May 1991 report. The answers to these questions reveal that the comment in the report by the Chief of the Languages Service was based largely, if not entirely, on the reservations expressed by the Chief of the Russian Translation Section rather than on her own evaluation. Those reservations were not adequately supported by the evidence, particularly in view of the Applicant's 1989 performance evaluation report. Moreover, prior to the Applicant's separation, the Chief of the Languages Service had recommended a one year extension of his contract to allow completion of his normal training period and did not withdraw this recommendation even after being asked to reconsider it by the Chief of the Russian Translation Section. His view of the Applicant as the least capable junior translator is not substantiated by a comparison of his 1989 performance evaluation report with the performance evaluation reports of the other junior translators. The Tribunal also finds

that the responses to questions directed to other members of the Joint Working Group indicate that their consideration was inadequate because it, too, was governed by the views expressed by the Chief of the Russian Translation Section rather than being based on a careful independent evaluation of all the pertinent evidence, including the Applicant's satisfactory 1989 performance evaluation report. Finally, it appears that the Chief of the Russian Translation Section was the object of a complaint by the Applicant in May 1990 to the Assistant Secretary-General for Human Resources Management, and to the Panel on Discrimination with respect to the Chief's hostile and allegedly biased intervention the previous month concerning the proposed normal extension of the Applicant's contract. The Tribunal cannot but conclude from all the evidence that, in the circumstances, the dominant role of the Chief of the Russian Translation Section in the Joint Working Group was highly questionable and that his actions were retaliatory in nature.

IV. The Tribunal was informed by the Respondent of an offer made to the Applicant after he had left UN employment, in an attempt to settle his claim, including details of conditions attached to the offer and of the Applicant's response. As the offer and response have no bearing on the Applicant's case before the Tribunal, information relating thereto should not have been disclosed. The Tribunal will therefore disregard it. The Tribunal trusts that in the future, no party will see fit to submit the content of unsuccessful settlement efforts, as this would be improper and might also discourage settlement discussions.

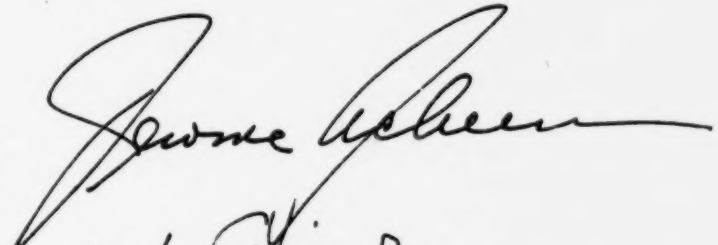
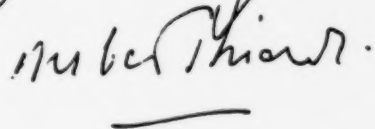
V. In view of the above, the Tribunal finds that the Applicant's separation, based on the belief that he was on secondment, was improper. He was plainly entitled, without any need for approval by the USSR authorities, to the extension of his appointment until 14 January 1991, as had been approved by OHRM and by the Chief of the Languages Service, on the basis of his satisfactory performance.

In addition, his right to be evaluated solely on objective grounds for an extension of his contract was violated by the injection of extraneous considerations.

VI. The Tribunal therefore finds that the Applicant is entitled to compensation and orders the Respondent to pay to the Applicant an indemnity equivalent to 19 months of his net base salary at the time of his separation from service.

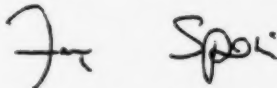
(Signatures)

Jerome ACKERMAN
Vice-President, presiding

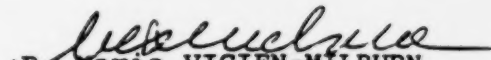



Hubert THIERRY
Member

Francis SPAIN
Member



New York, 11 November 1994


B. Maria VICIEN-MILBURN
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/687
11 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 687

Case No. 737: CURE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, President; Mr. Mikuin Leliel
Balanda; Mr. Mayer Gabay;

Whereas at the request of Daniel Cure, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 28 February, 31 May and 31 July 1993;

Whereas, on 29 June 1993, the Applicant filed an application, requesting the Tribunal, inter alia:

"...

(a) to re-examine the decision of the Secretary-General
to

(i) deny to the Applicant for a period of two
years the eligibility for within-grade
increment; and

(ii) demote the Applicant to the first step of the
grade below his actual one;

(b) To find that, in spite of the Applicant's repeated efforts to clarify the case, facts have been distorted during the investigations;

(c) To order the Respondent to reinstate the Applicant retroactively in his previous grade, including any pending annual salary increments, and restore him in his administrative career;

(d) To order the Respondent to remove from the records all and any reference that the Applicant's actions caused any friction, embarrassment or brought the Respondent into disrepute with the host government."

Whereas the Respondent filed his answer on 11 March 1994;

Whereas the Applicant filed written observations on 8 August 1994;

Whereas the Applicant submitted an additional document on 16 September 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 November 1970, as a Personnel Officer at the P-3 level, on a probationary appointment, and was assigned to the Economic Commission for Latin America and the Caribbean (ECLAC) in Santiago, Chile. His appointment became permanent on 1 November 1972. On 1 August 1976, the Applicant was promoted to the P-4 level. With effect from 1 September 1976, he was named Acting Chief, Personnel Section. On 12 January 1979, the Applicant was appointed Chief of the Section. On 1 January 1980, he was transferred to Headquarters. On 1 April 1983, he was promoted to the P-5 level and transferred back to Santiago, to serve again as Chief of the Personnel Section.

On 27 September 1991, a draft report by the Importation Committee dealing with "duty-free importation irregularities by two staff members in 1989-1991" was transmitted for comments to the Applicant and to his wife, who was also an ECLAC staff member. The letter of transmittal noted:

"In the context of a verbal complaint by the Chilean Foreign Ministry, about 'abuses' by ECLAC staff of the duty-free importation provisions, the Ministry cited as an example

the recent importation by [the Applicant] of alcoholic beverages and cigarettes under custom release No. 91/243. The Executive Secretary has asked us to examine the matter."

On 24 October 1991, the Applicant sent his comments on the draft report. On 29 October 1991, the Importation Committee submitted its final report to the Executive Secretary. On 18 December 1991, the Executive Secretary wrote to the Applicant, listing his import of alcoholic beverages and cigarettes during various periods in 1990 and 1991, with the comment that these importations

"... which were in excess of the ECLAC limits and with partial and no prior internal requests, are viewed as severe deviations from the ECLAC rules ... [and] appear to demonstrate repetitive and deliberate disregard on your part of the ECLAC rules established by the Executive Secretary with respect to duty-free importation privileges. They also appear to show that you acted in concert with your wife, in that you both took advantage of the position of trust which she enjoyed as Shipping Clerk responsible for the secretarial work of the Importation Committee and for the preparation of ECLAC's customs clearance forms ..."

The letter also referred to the import of a 29" TV set as

"deviating from the internal ECLAC importation rules in (i) exceeding the TV size-limits provided in these rules; and (ii) effecting the importation without requesting the internal approval required under the rules."

On 24 January 1992, the Applicant submitted his response to the allegations, portions of which read as follows:

"...3. I have never purposefully tried to circumvent the regulations and procedures of the Committee, either on my own or through my wife, nor have I ever imported or tried to import any items which I believed I would be forbidden to import by the Committee, as exceptions are granted to the internal regulations so long as the quotas dictated by the Chilean Government are respected. On the three occasions in which I requested an import over the ECLAC internal limits, I had no reason to believe I could not have obtained an exception from the Committee for the imports ..."

...9. To understand why I paid so little attention to the submission of revised requests for import, I believe it is important to state for the record that an 'informal' set of rules or practice has developed and grown around the 'formal' internal rules of the Import Committee. One aspect of this 'informal' system is the 'borrowing' of the unused or under-used quotas of other international staff members for the purpose of keeping the internal limits set by the 'formal' internal rules of the Committee, at least on paper.

...25. In sum, I regret not having been as careful as I should have been in ensuring that any requests for the importation of goods was submitted to the Committee. All the requests were dutifully entered in my file by the Secretary of the Committee (my wife), with no attempt made to keep requests 'off the record' ... Despite the fact that I was not as careful as I should have been in following up revised requests, or asking for exceptions when I should have, the reasons were poor planning and lack of attention, not any purposeful manipulation of records or any attempt made to circumvent the Committee."

On 27 February 1992, the Office of Human Resources Management at Headquarters informed the Executive Secretary of the Secretary General's decision to refer the allegations of misconduct to a Joint Disciplinary Committee (JDC). On 6 April 1992, the Applicant was so informed. The JDC adopted its report on 19 June 1992. It concluded and recommended as follows:

"IV. Conclusions

11. ... the Panel finds that the importations ... did indeed violate internal ECLAC regulations in the manner specified and that the general charge ... has been substantiated.

12. The Panel takes note of the following mitigating circumstances:

(a) There is no evidence that the staff member sought to profit monetarily by his acts; on the contrary, there is reason to believe that the staff member is often disorganized and forgetful, and that these traits, coupled with a lack of attention to detail, were contributory factors.

(b) Evidence put forward during the hearings regarding the practice of 'quota swapping' or 'quota gifting' would appear to support the view that the staff member might

conceivably have chosen to import under another staff member's quota if he had deliberately set out to exceed his own quota.

(c) The staff member appears to have relied heavily upon his wife to follow the required procedures. This attitude is all the more understandable in view of the fact that his wife could reasonably be expected to know exactly what steps were required, since her official duties included maintaining an updated file on each staff member's importations, comparing import request forms submitted by staff against the above-mentioned file to ensure that they remained within the established quotas, preparing and processing documentation relating to such imports for the approval of the ECLAC Import Committee, and preparing and submitting the corresponding documentation for the approval of the Ministry of Foreign Affairs of Chile. In this connection, the Panel also notes, however, that the import privileges --and, hence, the responsibility of ensuring that those privileges were not abused-- were the staff member's, not his wife's; therefore, the staff member's reliance on his wife in this connection does not exempt him from a substantial degree of responsibility in the matter.

13. The Panel also takes note of the following aggravating circumstances:

(a) The staff member appears to have taken advantage of his wife's particular position within the Organization to place himself above the rules governing staff import privileges.

(b) The reiterative nature of the infringements of the ECLAC rules concerning import privileges forms a pattern which strongly supports the contention that the staff member has exhibited a deliberate disregard for those rules ...

V. Recommendations

14. In the light of the above considerations, the Panel finds that the staff member took advantage of his wife's position in the Organization to infringe the internal ECLAC regulations governing the use of import privileges and therefore recommends that the Secretary-General issue a written censure and that the staff member be fined US\$750."

On 3 August 1992, the Under-Secretary-General for Administration and Management transmitted the JDC report to the Applicant and informed him as follows:

"The Secretary-General ... has concluded that your conduct constituted a serious violation of the UN standards of conduct and integrity and was of such a nature as to bring the Organization into disrepute in the host country.

The Secretary-General has given careful consideration to the mitigating and aggravating circumstances listed by the Committee. He has also taken into account the fact that, at all relevant times, you were Chief of Personnel in ECLAC and that, as such, you must be held to standards of conduct commensurate with your rank and responsibilities.

Pursuant to the Secretary-General's discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to demote you under staff rule 110.3(a)(vi) to the first step of the prior grade, with a two-year deferment of eligibility for within-grade increment, under staff rule 110.3(a)(iii) effective from the date of this letter."

On 29 June 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. No act has occurred that may be considered as unsatisfactory conduct as defined by United Nations staff rule 110.1, merely because the Applicant did not invariably follow internal ECLAC importation rules. Internal ECLAC rules are not part of the United Nations Staff Rules.

2. There is no evidence to confirm the statements of the Respondent that the host Government ever complained about the Applicant, verbally or in writing. The Applicant never exceeded the limits of duty-free importations authorized by the Government, and any communication from the Government concerning the Applicant should have been shown to him in accordance with administrative instruction ST/AI/292 on handling adverse material.

Whereas the Respondent's principal contentions are:

1. Establishment of internal duty-free importation rules for ECLAC officials was within the authority of the Executive Secretary.

2. Repetitive and deliberate disregard by the Applicant of these rules constituted conduct which fell short of the highest standards of integrity required from staff members under the Charter. That misconduct justified imposition of a disciplinary measure.

3. The Secretary-General's decision to demote the Applicant, with a two-year deferment of eligibility for within-grade increment, and to refuse to accept the JDC's recommendation for a written censure and a fine was a valid exercise of his discretion to impose a suitable disciplinary measure in the light of his assessment of the misconduct.

The Tribunal, having deliberated from 18 October to 11 November 1994, now pronounces the following judgement:

I. While the facts in this case are not in dispute, there is controversy regarding every other aspect. The Applicant asserts that whatever he did, even if wrong, was done in good faith and without any intention of violating the norms of importation for duty-free goods. The Respondent, on the other hand, sees a systematic pattern of wrong-doing in the Applicant's activities. The Applicant claims that he did nothing to disregard the laws of Chile, while the Respondent insists that the Applicant was obliged to observe scrupulously the provisions promulgated by ECLAC, having accepted them as terms of his appointment. The Applicant contends that the complaint of the Government of Chile, if in fact it was made, related to other importations by ECLAC staff. There was no ground for any objection to the imports made by the Applicant. Finally, the Applicant considers that the procedure followed in punishing him was flawed in many respects and showed a prejudice on the part of his supervisor. The Respondent seems to hold that, far from this being so, much of the trouble was due to the implicit

trust placed in the Applicant's wife, who was responsible for obtaining clearance for the Applicant's requests for duty-free imports. There are also other contradictions in the views of the parties.

II. The Tribunal notes that the Joint Disciplinary Committee (JDC) examined with care all aspects of the conflicting claims and counter-claims. It concluded that the Applicant was delinquent in his activities, that he sometimes imported goods much in excess of his entitlement, that at other times he did not apply for permission to import at all and that in still other instances, having obtained permission, he then imported more than had been permitted. In the circumstances, the Tribunal sees no need to re-examine the facts already scrutinized by the JDC. It will confine its judgement to some of the legal issues raised by the parties and to the question of whether the action taken by the Respondent was justified.

III. The first legal issue is whether the Applicant was bound to comply with the rules made by ECLAC for the importation of goods, rather than by the standards set forth by the Government of Chile. The Applicant contends that inasmuch as the rules promulgated by ECLAC were not formally approved by the General Assembly of the United Nations, they could not be considered as part of the Staff Rules and Regulations, and therefore the procedures for disciplinary action under Chapter X of these Rules and Regulations could not be applied. At the same time, the evidence shows that the Applicant was aware of the system established by ECLAC to control the import of duty-free goods and that the Applicant made efforts to adhere to the requirements of this system, despite the JDC's impression that the Applicant was "often disorganized and forgetful". Staff rule 110.1 prescribes that a staff member is to "comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules and other relevant administrative issuances." The Tribunal has little doubt that the "Reglamento de Importación" introduced by ECLAC is such a relevant issuance,

irrespective of whether or not it was pursuant to an agreement between the Government of Chile and ECLAC. The Applicant cannot escape the obligations imposed by the ECLAC internal regulations by arguing that they were not approved directly by the General Assembly. Subsidiary organs frequently have their own rules and regulations, which are applicable to all their staff members, provided, of course, that they are made known in advance. There is no doubt in this case that the Applicant knew what was expected of him and did in fact generally follow the regulations; when he did not or could not or would not, he apologized or tried to explain away such lapses.

IV. In these circumstances, the Tribunal finds that any staff member of ECLAC is bound by ECLAC regulations and cannot take shelter, when accused of violating these regulations, by arguing that his actions did not violate the terms of an agreement between ECLAC and the Government of Chile. The Tribunal notes, however, that the Respondent's contention that the Applicant had, by his activities, strained relations between ECLAC and the Government of Chile appears not to be altogether well founded.

For this reason, the Tribunal has some hesitation in accepting that the Applicant's conduct was, by itself, of such a nature "as to bring the Organization into disrepute in the host country." The record does not adequately support this conclusion. It is clear to the Tribunal that the infringements complained of by the Government affected a much wider circle of people and were not confined to the Applicant. Hence, the Tribunal does not consider it appropriate that the Applicant's personnel file should contain any reference to the Applicant's actions as having brought the Respondent into disrepute with the host government.

V. In respect of the charges brought against him, the Applicant offers some explanation for his actions. He contends that they were guided by the common practice of "quota swapping", and of the retroactive approval of requests. He further maintains that his

actions were necessitated by the special requirements he had for alcohol, cigarettes, etc., for social occasions he was organizing. Despite the evidence he submits in support of his contentions, the Tribunal cannot accept, as justification for any proven wrong-doing on the part of the Applicant, his argument that other staff members could have been equally remiss in importing duty-free goods.

VI. The Applicant alleges that in at least one instance, he was not informed in a timely manner that disciplinary action against him was being contemplated. He also claims that his immediate supervisor (who was a member of the Importation Committee) adopted a hostile attitude towards him, even in the early stages of the investigation. The Tribunal notes that but for the co-operation between the Applicant and his wife, some of the wrong-doings which occurred might have been avoided. The record indicates that the Executive Secretary of ECLAC, who signed the internal approval forms for importation, relied on the Applicant's wife, who was both the shipping clerk and the secretary to the Importation Committee and trusted, without his own documentary verification, that the importation documentation presented to him by her for his signature, conformed to the internal approval forms. The evidence shows that the Applicant, far from being a victim of prejudice or of procedural and other flaws, benefited from the procedural laxity and the trust enjoyed by his wife.

VII. Finally, the Tribunal turns to consideration of whether the Respondent's decision to demote the Applicant to the first step of his prior grade, with a two-year deferment of eligibility for within-grade increment, which deviated from the milder recommendation of the JDC, was consistent with his discretionary powers. In Judgement No. 479: Caine (1990), the Tribunal held:

"The Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to

determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact." (See also Judgements No. 424, Ying and No. 425, Bruzual)

In the present case, the Tribunal has not found any evidence to suggest that the Secretary-General was influenced by any prejudicial or extraneous factors. Once the Secretary-General decided, on the basis of such facts as were available to him, that the Applicant's conduct violated U.N. standards of integrity, he was free to decide what penalty under staff rule 110.3(a) would be appropriate.

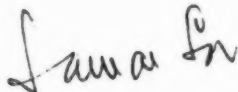
VIII. In the light of the foregoing, the Tribunal

(i) Decides that the Respondent should remove from the Applicant's personnel file any conclusion that his action brought the Respondent into disrepute with the host Government.

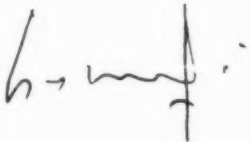
(ii) Rejects all other pleas of the Applicant.

(Signatures)

Samar SEN
President



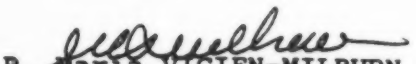
Mikuin Leliel BALANDA
Member



Mayer GABAY
Member



New York, 11 November 1994



R Maria VICIEN-MILBURN
Executive Secretary